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Supreme Court of the United States

October Term, 1973
No. 73-1010

ROBERT MITCHELL,
Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Sixth Appellate Judicial District of the State of Ohio

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PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Sixth Appellate Judicial District of the State of Ohio

Petitioner, herein, Robert Mitchell prays for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Appellate Judicial District of the State of Ohio entered on June 5, 1973, affirming the order of the Court of Common Pleas of Lucas County, Ohio entered on January 24, 1973, which dismissed the complaint herein upon the respondent's motion for a directed verdict.

OPINION BELOW

The order and judgment entry of the Court of Common Pleas granting respondent's motion for a directed verdict in the Appendix herein at p. 18. The judgment entry of the Court of Appeals is printed in the Appendix hereto at p. 15, and the memorandum opinion at pp. 15, 16,

17. An application for leave to appeal to the Supreme Court of Ohio was overruled by that Court on September 20, 1973, at p. 13.

JURISDICTION

In this case, federal jurisdiction is based upon there being a federal question involved. The governing law is that of Section 51, Chapter 2, Title 45 of the United States Code. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and Rule 19 (a) of this Court which provides for a review on a writ of certiorari,

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

QUESTION PRESENTED

1. Where the evidence shows that the petitioner, who was employed by respondent railroad as a cashier, had immediately prior to his injury been in the cook car in the railroad yard, taking a coffee break, and upon emerging from the cook car had tripped due to a defect in the stairs of the cook car and severely injured himself; is the decision of the Court of Appeals affirming a directed verdict for the respondent on the ground that petitioner was not employed by the respondent within the meaning of the second paragraph of 45 U.S.C., Section 51 and therefore was not entitled to protection under the Federal Employers' Liability Act, 45 U.S.C., Section 51 et seq., in conflict with decisions of the Supreme Court of the United States interpreting the above federal statute?

FEDERAL STATUTE INVOLVED

45 U.S.C., Section 51 reads as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none then of such employees parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliance, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

This is a personal injury action arising out of the petitioner's tripping and falling, thereby severely injuring himself, when alighting from a cook car located on respondent's premises. The action was filed in the Court of Common Pleas of Lucas County, Ohio on March 1, 1972.

At the close of the petitioner's case, respondent moved for a directed verdict. The trial court found that the petitioner's evidence was insufficient as a matter of law to establish that petitioner, at the time of the accident, was employed by the respondent within the meaning of the second paragraph of 45 U.S.C., Section 51 and therefore was not entitled to protection under the Federal Employers' Liability Act, 45 U.S.C. et seq. Thereupon, judgment was given for the respondent and the complaint was dismissed with prejudice (Appendix, p. 18). On appeal to the Court of Appeals of the Sixth Appellate Judicial District of the State of Ohio, the judgment of the trial court was affirmed with one Justice dissenting (Appendix, p. 15). Petitioner's motion for leave to appeal to the Supreme Court was then overruled by that Court (Appendix, p. 13).

Petitioner had been employed by the respondent since 1957, and on December 2, 1970 occupied the position of cashier. His hours were from 11:00 a.m. to 8:00 p.m., and on December 2, 1970, his pay period continued to 8:00 p.m.

On the evening of December 2, 1970, and at approximately 7:45, during the period of time when he was still being paid for his work, and required to be present on the premises, petitioner noticed the cook standing in the doorway of the cook car adjacent to petitioner's office.

There were not any steps on the side of the car that was facing the office. Petitioner consequently entered the cook car for a coffee break. A few minutes later, petitioner began to emerge from the cook car, but was still within the period of time for which petitioner was being paid by respondent, i.e. approximately 7:50 to 7:55 p.m. It was at this time that plaintiff sustained his injuries on a set of negligently constructed and maintained stairs descending from the cook car. Petitioner sustained injuries in the area of his right knee, ankle and arm, and has suffered permanent and disabling injuries in his right lower extremities.

STAGE OF PROCEEDING AT WHICH FEDERAL QUESTION WAS RAISED

Petitioner raised the Federal question in the Common Pleas Court of Lucas County, Ohio, by his pleadings in the complaint which alleged

> "Now comes plaintiff and alleges and avers as follows:
>
> 1. That he brings this action pursuant to the Federal Employer's Liability Act and states that he sustained injuries on or about the second day of December, 1970 while in the employ of the defendant, and in and affecting interstate commerce."

The trial court and its judgment entry of January 24, 1973, directed a verdict against petitioner on respondent's motion; stating in its opinion:

> (1) "That plaintiff, at the time of his accident, was not employed by the defendant within the meaning of the second paragraph of 45 U.S.C., Section 51

and therefore was not entitled to protection under the Federal Employers' Liability Act, 45 U.S.C., Section 51 et seq." (App. p. 18).

Upon appeal to the Court of Appeals of the Sixth Appellate Judicial District of the State of Ohio, the petitioner again raised the Federal question by virtue of his first Assignment of Error. Said Assignment reading:

"The Trial Court erred in directing a verdict in favor of the defendant and against the plaintiff, when there was sufficient evidence at least to support a jury's finding that the plaintiff was in the scope of his employment for purposes of the Federal Employers' Liability Act at the time of his injury."

The Court of Appeals on June 5, 1973, rejected this argument and affirmed the judgment of the trial court (App. p. 15).

Petitioner on motion for leave to appeal to the Supreme Court of Ohio raised a Federal Question by virtue of his Assignment of Error:

(1) "For purposes of the Federal Employers' Liability Act, an employee is within the scope of his employment and protected by the Federal Employers' Liability Act. When during working hours, he is either on his way to or on his way from a place provided on the premises of the defendant railroad for purposes of rest and refreshment either before, during, or after the actual work operations of said employee."

The Supreme Court of Ohio rejected this argument on September 20, 1973, by overruling petitioner's motion for leave to appeal (App. p. 13).

REASONS FOR GRANTING THE WRIT

It has already been indicated that at the time the petitioner sustained his injury, he was a cashier employed by the respondent, Norfolk and Western Railroad (at the Defiance, Ohio yard). His job included the requirement that he walk through the yard to check the various cars that were to be made up into trains, etc.

Immediately prior to his injury, he had been in the cook car provided by respondent at the yard, taking a coffee break.

In the case of *Mostyn v. Delaware, L. & W. Railway Company,* 160 F.2d 15 (2d Cir. 1947), at pages 17 & 18 the court held:

> "Where railroad provides shelter or food, or bath for its employees and they are using the accommodations so provided to prepare themselves for their work, or to rest or recuperate, they must be regarded as in 'the employ' of the railroad within the Federal Employers' Liability Act."

In the case of *Baltimore & O. R. Co. v. Kast,* 299 F. 419 (6th Cir. 1924), Headnote one reads as follows:

> "A railroad employee, engaged in work and interstate commerce, who had stopped work and was going after his lunch on the premises when injured, with the intention of returning immediately afterward to the same work was employed in 'Interstate Commerce' at the the time of injury, within Employers' Liability Act, Section 1 (Comp. St. Section 8657)

In the case of *Komar v. Pennsylvania Railroad Co.,* 184 A. 293 (Pa. 1936), Headnote No. 1 reads as follows:

"Workmen's Employment whether in interstate or intrastate transportation, is not broken by a short interval of time taken as a noonday meal on employer's premises, unless he does something wholly foreign to his employment." (77 P.S. Section 41) (Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-59).

In the case of *Trout v. Chicago, R. I. & P. Railway Co.*, 39 S.W.2d 424 (Mo. 1931), Headnote No. 3 reads as follows:

"The Act of a fireman on a switch engine in returning to work after lunch would be incidental to interstate commerce, if part of days work as a whole was interstate commerce" (Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-59).

A United States Court of Appeals in the case of *Powers v. New York Central Railroad Co.*, 251 F.2d 813 (2d Cir. 1958), 76 A.L.R.2d 1207, at pages 816 and 817 of its opinion stated as follows:

"An employee does not lose his character as an employee at the very moment his working time ends. *Mostyn v. Delaware L. & W. Railway Co.*, 2 Cir., 160 F. 2d 15, cert. den. 1947, 332 U.S. 770, 68 S. Ct. 82, 92 L. Ed. 355. An employee still on the employer's property who is leaving work within a reasonable time after the work day is over is certainly within the protection of the Federal Employers' Liability Act. 45 U.S.C.A., Section 51 et seq.; *Erie Railroad Co. v. Winfield*, 1917, 244 U.S. 170, 37 S. Ct. 556, 61 L. Ed. 1057; *Morris v. Pennsylvania Railroad Co.*, 2 Cir., 1951, 187 F. 2d 837, 841 where the deceased was injured on the railroad's property 45 minutes prior to when he was due to report for work."

The *Powers* case goes even further than proposed by petitioner. Under the authority of the *Powers* case presumably the petitioner would be entitled to reversal and a new trial even if the injuries he had received had occurred after 8:00 p.m. In this case, decided by the United States Court of Appeals for the Second Circuit, the Court said:

> "An employee does not lose his character as an employee at the very moment his working time ends."

The Court, in other words, held that "An employee still on the employer's property who is leaving work within a reasonable time after the work day is over is *certainly within the protection of the Federal Employers' Liability Act*" (emphasis supplied).

In the case of *Wallace v. St. Louis-San Francisco Railway Company*, 120 So.2d 131, the court in its headnote held as follows:

> "The Federal Employers' Liability Act, covered a temporary departure by an employee from his line or course of duty as where a fireman, after oiling, firing and preparing his engine for interstate journey, temporarily leaves his engine to go to his nearby boarding house and is struck while on the railroad premises."

The American Law Reports Annotation referred to above contains a rather extensive discussion on the subject and a conclusion as follows:

> "Generally, the master-servant relationship is not suspended during a servant's lunch hour. Such period considered merely an incident of employment. Thus, an employee injured or killed on his master's premises during a lunch hour has been regarded as having the status of an employee at the time of the accident, and hence as within the provisions of the Federal Employers' Liability Act. . . ." 76 A.L.R.2d 1268.

Many cases are cited in support of this generalization, as well as the generalization that the relationship of master and servant exists for a reasonable time after working hours, which goes even further than this Court is requested to consider in the instant case. In support of the more liberal view are several cases appearing at page 1267 of the A.L.R. Annotation and the pages following. These cases hold that an employee is in the course and scope of his employment and thereby covered by the Federal Employers' Liability Act, even after working hours if the time is reasonably near the cessation of work hours and is on the company premises.

How much more so, then, was petitioner within the course and scope of his employment within the meaning of the Federal Employers' Liability Act, when sometime before his usual quitting time, he was emerging from the cook car provided by the respondent railroad for refreshment of railroad employees, on the respondent's premises.

Inasmuch as there is a wealth of Federal Court decisions, presumably the Federal Court decisions should be adequate to guide the State Courts. The decision appealed, however, makes it abundantly clear that a pronouncement by the Supreme Court of the United States is necessary to provide the proper guidelines and authorities for the State Courts to follow.

Ohio is and has been one of the greater industrial states with much reliance upon the railroads for transportation and shipment. Railroads are employers of many of the citizens of Ohio and inasmuch as the Federal Employers' Liability Act provides for the State Courts as an alternative and proper forum for recovery under the Federal Employers' Liability Act, a pronouncement by the Supreme Court of the United States on petitioner's question

raised herein, is necessary in order to prevent conflict or misinterpretation of 45 U.S.C. Section 51 of the Federal Employers' Liability Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO

(Entered September 20, 1973)

No. 73-575

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

ROBERT MITCHELL,
Appellant,

vs.

NORFOLK & WESTERN RAILROAD CO.,
Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR LUCAS COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

(Certificate of Clerk omitted in printing.)

NOTICE OF APPEAL TO SUPREME COURT

(Filed June 18, 1973)

C.A. No. 7378
C.P. No. 72-0406

IN THE COURT OF APPEALS FOR
LUCAS COUNTY, OHIO

ROBERT MITCHELL,
Plaintiff-Appellant,

-vs-

NORFOLK & WESTERN RAILROAD COMPANY,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF OHIO

Pursuant to the provision of Chapter 2505 of the Ohio Revised Code and Rule I, Section 1(A) of the Rules of Practice of the Supreme Court of Ohio, notice is hereby given that Robert Mitchell, Plaintiff-Appellant herein, hereby appeals to the Supreme Court of Ohio from the final judgement of the Court of Appeals of Ohio, Sixth Appellate District, Lucas County, Ohio, entered by that Court in this action on June 4, 1973.

Respectively submitted,

CUBBON AND GOLDBERG CO., L.P.A.
By /s/ DAVID R. GOLDBERG

(Certificate of service omitted in printing.)

JUDGMENT OF LUCAS COUNTY COURT OF APPEALS

(Entered June 5, 1973)

C.A. No. 7378

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF LUCAS

ROBERT MITCHELL,
Appellant,

vs.

NORFOLK & WESTERN RAILROAD CO.,
Appellee.

DECISION AND JOURNAL ENTRY

Date: May 25, 1973

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

Finding from the record that the appellant was employed as a cashier and had completed his work as cashier for the day and ten to fifteen minutes prior to his established quitting time had left his immediate place of employment and had crossed over several tracks to go to a cook's camp car for the sole purpose of having a cup of coffee with the cook, and further finding from the record that the camp car had no connection with appellant's department, that appellant had never visited the

camp car before, and further finding that appellant did not anticipate returning to his own specific place of employment and in fact did not return to his place of employment but proceeded on to a union meeting with a friend for whom he was waiting at the time of his injury, and further finding that he was not at a place where his employer could expect or could anticipate that he would be at the time of his injury, there was not sufficient evidence to support a jury's finding that the plaintiff was within the scope of his employment for the purposes of the Federal Employer's Liability Act (See Atchison, T. & S.F. R. Co. v. Wottle, 193 Fed. 2d. 628; Wallace v. St. Louis-SanFrancisco R.R. Co., 120 So. 2d 131; Ohio Jur. 2d. Master & Servant, Sec. 190), and further finding that appellant, if considered a frequenter rather than an employee, was contributorily negligent as a matter of law (Flury v. The Central Publishing House of the Reformed Church in the United States, 118 Ohio St. 154; Izola BeCant v. Roger Miller Ford, Inc., Fulton County Court of Appeals, C.A. No. 232), the trial court did not err in directing a verdict in favor of the defendant and against the plaintiff.

On consideration whereof the judgment of the Common Pleas Court of Lucas County is affirmed at the costs of the appellant. Cause remanded to said court for execution for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals

at which time the period for review will begin to run. App. R. 22(E).

/s/ JOHN W. POTTER
Presiding Judge

/s/ FRANK W. WILEY
Judge

JOHN W. POTTER, *P.J.* and
FRANK W. WILEY, *J.* concur.
CLIFFORD F. BROWN, *J.* dissents.

BROWN, *J.*, dissents, expressing the view that the plaintiff's injury occurred on defendant's premises before plaintiff's work shift ended and was thus within the scope of plaintiff's employment within the meaning of the F.E.L.A. and therefore compensable.

JUDGMENT OF COMMON PLEAS COURT

(Entered January 24, 1973)

No. 72-0406

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

ROBERT MITCHELL,
Plaintiff,

vs.

NORFOLK & WESTERN RAILROAD CO.,
Defendant.

JUDGMENT ENTRY

This day this cause came on for jury trial, and, at the close of plaintiff's evidence, defendant moved for a directed verdict under Ohio Civil Rule 50 (A), on the following grounds: (1) that plaintiff, at the time of his accident, was not employed by the defendant within the meaning of the second paragraph of 45 U.S.C., Section 51 and therefore was not entitled to protection under the Federal Employers' Liability Act, 45 U.S.C. Section 51 *et seq.*; (2) that defendant, at the time and place of plaintiff's said accident owed plaintiff no duty and therefore was not negligent; (3) that the said accident was caused by plaintiff's sole negligence; and (4) that even if reasonable minds could find that defendant was negligent and that such negligence was a cause of plaintiff's accident, that plaintiff himself, was negligent which negligence was a cause of his accident.

The Court, having heard the testimony and received evidence in plaintiff's case, having listened to the arguments of counsel for the parties, and having reviewed the memoranda of said counsel submitted to the Court, finds, after construing the evidence most strongly in favor of the plaintiff, that reasonable minds, as to the first ground stated hereinabove, can come to but one conclusion upon the said evidence submitted and that conclusion is adverse to plaintiff, and therefore defendant's Motion as to the first said ground stated hereinabove, should be, and hereby is sustained, and a verdict should be, and hereby is directed in favor of defendant at plaintiff's costs. Since a directed verdict in favor of defendant on the first ground set forth hereinabove is dispositive of the issue of liability in this case, this Court need not rule on the remaining three ground set forth in defendant's said Motion.

IT IS SO ORDERED.

/s/ ROBERT WILSON
Judge

APPROVED:

/s/ DAVID R. GOLDBERG

/s/ E. THOMAS MAGUIRE

FEDERAL EMPLOYERS' LIABILITY ACT

45 U.S.C. Section 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependant upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliance, machinery, tract, works, roadbed, wharves, boats, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.